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NO. 81-113

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

DEWEY SOWDERS, SUPERINTENDENT,
KENTUCKY STATE REFORMATORY,
PETITIONER,

v.

EARL WAYNE WILEY,
RESPONDENT,

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

WAS THE UNITED STATES COURT OF APPEALS CORRECT IN HOLDING THAT WILEY HAD EXHAUSTED HIS STATE REMEDIES AS TO THE ISSUE OF WHETHER HE RECEIVED THE EFFECTIVE ASSISTANCE OF COUNSEL WHERE THE ISSUE WAS RAISED ON APPEAL BEFORE THE KENTUCKY SUPREME COURT AND THE COURT TOOK THE UNUSUAL STEP OF PERMITTING A BRIEF FILED BY TRIAL COUNSEL EXPLAINING THEIR "STRATEGY" ACCOMPANYING AN AFFIDAVIT FROM THE TRIAL JUDGE STATING THAT PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL AS WELL AS SUPPLEMENTAL BRIEFING ON THIS ISSUE BY THE APPELLANTS, WHERE KENTUCKY EMPLOYS A SIGNIFICANTLY DIFFERENT STANDARD TO JUDGE THE ISSUE OF THE EFFECTIVENESS OF COUNSEL THAN DOES THE SIXTH CIRCUIT AND WHERE KENTUCKY FAILED TO PROPERLY PRESENT THE ISSUE OF EXHAUSTION TO THE UNITED STATES DISTRICT COURT?

II.

DID TRIAL COUNSEL'S ADMISSION OF GUILT ON WILEY'S BEHALF DURING THE CLOSING ARGUMENT OF THE "SUBSTANTIVE" PHASE OF WILEY'S TRIAL AND A CODEFENDANT'S LAWYER'S ADMISSION OF GUILT ON WILEY'S BEHALF DURING THE "ENHANCEMENT" PHASE OF WILEY'S TRIAL DENY WILEY HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO THE EFFECTIVE ASSISTANCE OF COUNSEL AND DUE PROCESS OF LAW WHERE: 1) WILEY WAS CONTESTING HIS GUILT AND DID NOT CONSENT (ON THE RECORD OR OTHERWISE) TO HIS LAWYER'S ADMISSION OF GUILT ON WILEY'S BEHALF; 2) WILEY DID NOT CONSENT (ON THE RECORD OR OTHERWISE) TO A CODEFENDANT'S LAWYER'S CLOSING ARGUMENT ADMITTING GUILT ON WILEY'S BEHALF; 3) NO COMPETENT TRIAL STRATEGY COULD JUSTIFY COUNSEL'S ACTIONS IN ADMITTING WILEY'S GUILT UNDER THE CIRCUMSTANCES OF THIS CASE; AND 4) ONE OF THE ATTORNEYS ADMITTED DURING ARGUMENT THAT THEY WEREN'T ASKING FOR MERCY?

III.

WAS WILEY DENIED HIS FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS AGAINST INCRIMINATION AND TO CONFRONTATION, TRIAL BY JURY, AND DUE PROCESS OF LAW WHEN HIS LAWYER AND A CODEFENDANT'S LAWYER ADMITTED GUILT ON WILEY'S BEHALF DURING CLOSING ARGUMENT OF BOTH PORTIONS OF WILEY'S TRIAL, BUT WILEY'S CONSENT TO THESE ADMISSIONS OF GUILT ON HIS BEHALF DOES NOT APPEAR ANYWHERE IN THE RECORD?

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Respondent, Earl Wayne Wiley, respectfully prays that a Writ of Certiorari not issue to review the opinion of the United States Court of Appeals for the Sixth Circuit entered on April 24, 1981.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution, in pertinent part:

> No person shall...be compelled in any criminal case to be a witness against himself...

The Sixth Amendment to the United States Constitution, in pertinent part:

> In all criminal prosecutions the accused shall enjoy the right to a...trial, by an impartial jury...to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Fourteenth Amendment to the United States Constitution, Section One, in pertinent part:

> ...nor shall any State deprive any person of...liberty...without due process of law...

COUNTERSTATEMENT OF THE CASE

A.

PROCEDURAL HISTORY

Earl Wayne Wiley, respondent, was indicted by the Henderson County Grand Jury on August 1, 1978 [Indictment No. 78-CR-049] along with his brother, Elmer Lee Wiley, for first degree burglary, theft of the value of $100.00 or more and being a persistent felony offender in the second degree. The offenses were allegedly committed on July 13, 1978 [Joint Appendix in Sixth Circuit , hereinafter A, 1-3].

On August 8, 1978, Earl was arraigned and counsel appointed to represent him, Hon. William B. Norment, Jr. [A, 4-5]. Earl pled "not guilty" [A, 5]. Separate counsel was appointed for Elmer, Hon. H. Carlton Buchanan [Transcript of State Record, hereinafter TR, 6]. Elmer also pled "not guilty" [TR, 7].

The Wileys' trial was jointly held on September 20, 1978 [Transcript of Evidence, hereinafter TE, 1]. The jury found both Earl and Elmer guilty of first degree burglary and theft, sentencing each to 10 and 5 years, respectively [A, 6-7]. At the persistent felony phase of the trial held that evening, the same jury found the Wileys guilty and sentenced them to life imprisonment [A, 8]. Judgment was entered October 2, 1978, sentencing Earl to life [A, 9-10].

The Wileys appealed to the Supreme Court of Kentucky, which affirmed their convictions on September 11, 1979. Wiley v. Commonwealth, Memorandum Opinion Per Curiam (File No. 78-SC-626-627-MR) [Appendix to Petition for Writ of Certiorari, hereinafter P, 64-67]. Earl filed a petition for writ of habeas corpus and supporting memorandum in the district court on December 3, 1979 [Docket Entry, hereinafter DE, 2; A, 159-163]. The magistrate's report and recommendation was filed on March 3, 1980 urging denial of the petition [DE, 5; P, 50-63]. Wiley's objections were filed on March 11, 1980 [DE, 7; A, 179-181]. Respondent filed no objections. On March 3, 1980, the district court adopted the magistrate's report and entered a judgment denying the petition

[DE, 8; P, 48-49]. On May 5, 1980, Judge Johnstone issued a certificate of probable cause [DE, 13; A, 188]. On April 24, 1981, the United States Court of Appeals for the Sixth Circuit reversed the judgment of the district court [P, 31-47].

B.

STATEMENT OF THE FACTS

The first witness at trial, Margaret Rummans of Budget-Rent-A-Truck, testified that on July 13, 1978, at around 1:00 or 1:15 p.m., she rented a cargo van to Earl Wiley [A, 12, 14].

The next witness, Kenneth Tegethoff, testified that around 2:15 p.m. on July 13, 1978, he observed a Budget-Rent-A-Truck leave from behind his father's house [A, 19, 21-22]. There were two white males in the truck but Mr. Tegethoff could not identify them [A, 26]. After discovering that a sewing machine was missing, Mr. Tegethoff called the sheriff [A, 23-24]. The next day Mr. Tegethoff identified a similar truck which contained numerous items belonging to his parents [A, 27, 29-37].

The Assistant Police Chief of Providence, Bob Williams, testified that around 2:40 or 2:45 p.m. on July 13, 1978 [A, 55], a van answering the description of the van seen at the Tegethoff home was stopped at a roadblock [A, 49]. Williams identified Earl Wiley as the driver of the van [A, 50-51], and Elmer as a passenger [A, 53]. Williams testified that Earl gave him a receipt for a driver's license with his name on it [A, 505]. Shortly thereafter, Earl fled [A, 52]. On cross-examination, Williams described Elmer as "tired and sleepy and worn out and possibly with a hangover" [A, 57].

The sixth witness at trial was Bobby Lee Sauls, Sheriff of Webster County [A, 59]. Sauls testified that when he arrived where the van had been stopped, Elmer was in custody and another person had fled [A, 61]. Sauls testified that he entered the vehicle and removed a .22 pistol and other tools from a pillow slip on the floor between the front seats [A, 66-67]. Sauls also stated that Elmer had told him "it was his brother that was with him and he (Elmer) was helping him move" [A, 62-63]. Earl's motion for a mistrial was overruled, but the jury was admonished

to disregard the statement [A, 63-64]. On cross-examination, Sauls testified that he found some cans of beer in the back of the van [A, 72]. Elmer was described as "shaking and in pretty bad shape" [A, 73]. Sheriff Sauls permitted Elmer to drink the beer [A, 73].

At the close of the evidence, counsel's motion for a directed verdict of acquittal was overruled [A, 75-77]. A defense request for an instruction on circumstantial evidence was also refused [A, 78-82]. Finally, counsel's request for instructions on the lesser degrees of burglary (second and third degree) was refused [A, 82].

The closing argument for both Earl and Elmer was made by Hon. William B. Norment, Jr. [A, 83]. During this argument, Mr. Norment repeatedly admitted that both Earl and Elmer were guilty [A, 87-88, 90-91, 93, 96-97]. After informing the jury that Mr. Buchanan and he were "appointed to represent these two men," Mr. Norment argued:

> Often times when a lawyer gets involved in a case, he gets stars in his eyes and he starts having notions that there may be some way, you know, if I examine this case... and I do my homework and I go out and I investigate as much as I can and I interview all the witnesses, that I'll be able to get a man off. That I will be able to prove to a jury that he is not guilty with what they have got him charged with.
>
> The stars aren't in our eyes in this case, ladies and gentlemen. They never have been. We're all adults. We're all mature thinking human beings...
>
> * * * *
>
> But as I said, the stars aren't in my eyes in this case. And they are not in Mr. Buchanan's eyes. Because unfortunately for these two men that you see here today, they are guilty. They're guilty as charged by the Commonwealth's Attorney's office.
>
> Mr. Walker in voir diring you all said, do you understand that the indictment...doesn't become a question of fact until I prove beyond a reasonable doubt that they are in fact guilty.
>
> We have to stand and give him credit for that because, ladies and gentlemen of the jury, he has proved to you beyond a reasonable doubt that these gentlemen are guilty of this crime. We don't have stars in our eyes, and we never have. They're guilty. [A, 87-88.]

* * * *

I couldn't stand up here and argue to you on behalf of Earl Wiley -- you know there were no eye witnesses, and I could make the same argument about Elmer Wiley -- you know there were no eye witnesses, nobody saw them go in and come out. I'm not that foolish. I'm not that naive. And I know you're not.
I know, and you know, you're going to give these men time in the penitentiary. And they know it, or they had better know it after they've heard the evidence here today. They're going to the penitentiary. That part's easy because they're guilty. I can't stand up here and say they didn't do it, they haven't proven that they did it, I'd be foolish and naive and immature. Because they did do it. And the Commonwealth's Attorney's office has proven to you that they have done it. [A, 89-90.]

* * * *

I told you before we know they are going to the penitentiary. And they know that they're going to the penitentiary. And you know they're going to the penitentiary.

* * * *

...It's bad, and it's a crime, and you know and I know and they know they are going to the penitentiary.... [A, 91-92.]

* * * *

Ladies and gentlemen, we submit to you that in this case, in this case, that we are here about today the question of guilt is absolutely clear. Absolutely clear, beyond a question of a doubt. You know sometimes we stand up and we argue beyond a reasonable doubt. We don't have that argument here today. We don't have that argument here today. I don't think there is a reasonable doubt. I don't think there is a shadow of a doubt that these two men are guilty. [A, 93.]

We ask that you be a compassionate jury and a merciful jury within reason because we know good and well as I stand here today that you're going to find these boys guilty. I know you are going to find them guilty. There is no question in my mind about it. There is no question in your mind about it... I'd venture to say that there's not a single one of you sitting here who is not going to say that these boys are guilty. I know that. It's going to happen. We know that it is going to happen.

* * * *

These boys are guilty. And they need to be punished. And they ought to be punished. And I'd be a lying fool to the citizens of Henderson, Kentucky, if I told you you otherwise. [A, 96-97.]

During his closing argument the prosecutor commented to the jury that he thought

> ...when Mr. Norment started in to his argument, and he was about half way through it that I would just stand up and say, I accept his argument. I thought that he did admirably well for about half of it, arguing for the prosecution. [A, 98.]

After fifteen minutes of deliberations, the jury returned a verdict finding both Earl and Elmer guilty of first degree burglary and theft and sentencing each to 10 and 5 years, respectively [A, 106].

During the persistent felony offender stage of the trial, Barbara Gregory, Deputy Clerk of the McCracken Circuit Court, was called as a witness. Mrs. Gregory read three judgments to the jury which indicated that Earl Wiley had been previously convicted of three counts of dwelling house breaking on August 23, 1974 [A, 107-116]. Counsel's motion for a directed verdict of acquittal was overruled [A, 121-122]. Elmer's lawyer, Mr. Buchanan, argued in closing for both Earl and Elmer. Mr. Buchanan admitted that both Earl and Elmer were guilty of being persistent felons [A, 125], although the record does not reflect any consent or waiver by Earl or Mr. Norment.

> Elmer and Earl Wiley have been here before. Each of these men has been previously adjudged guilty of going where they had no right to be, and taking what did not belong to them. That's in the record here.
>
> Earl in 1974. Elmer in 1972. Both in McCracken Circuit Court down in Paducah. In the most literary sense of the term, ladies and gentlemen, when that happened in '74 and '72 to him, both of these men incurred a debt to society...
>
> Elmer Wiley's first debt in '74 -- excuse me, in '72, and Earl's first one in '74, that that means that you must assess an ultimate toll here today that is far far heavier than anything that you have done before. [A, 124-126.]
>
> * * * *
>
> I submit that you folks had a very very strong suggestion, a very very strong indication before you were sent out the first time garnered from Mr. Norment's statement that these guys had been down the road before. Well there it is. They have. They have been down the road before and they are still on the same road.... [A, 127.]
>
> * * * *

> We don't ask you folks for mercy here. I feel there's little enough of that in the world anyway and what there is isn't to be applied in a case like this. These men are guilty. They are guilty of a serious crime. We haven't tried to duck that. We haven't tried to pull any wool over your eyes on that. [A, 129.]

In response to this argument, the prosecutor noted that the two sides were only "fighting over how much time should those two gentlemen have" [A, 130]. "Mr. Buchanan says that both of these gentlemen have been down the road before" [A, 130]. After ten minutes deliberations, the jury found both Earl and Elmer guilty as second degree persistent felons and sentenced each to life imprisonment [A, 8, 136].

On appeal Wiley's principle contention (and that of his brother) was that his lawyer admitted guilt on his behalf without his permission. The Supreme Court of Kentucky was presented with arguments that: 1) Wiley's counsel was ineffective in admitting Wiley's guilt without his consent; 2) Wiley's counsel was ineffective in admitting Wiley's guilt regardless of Wiley's consent as this was not, under the circumstances of this case, a legitimate "trial tactic;" and 3) Wiley was denied due process of law because the record did not affirmatively demonstrate Wiley's consent to his lawyer's guilty plea on his behalf. [See briefs in Kentucky Supreme Court, Wiley v. Commonwealth, File No. 78-SC-626.] The Court took the unusual step of permitting trial counsel for both defendants to file an "amicus curiae brief" in support of the Commonwealth's position on appeal detailing their trial strategy and asserting that they rendered effective assistance of counsel to their former clients [A, 137-147]. Furthermore, attached to the brief and filed in the Supreme Court of Kentucky was an affidavit from the trial judge expressing his opinion that trial counsel were "competent, professional and enthusiastic" in their representation of the Wileys at trial and "did their best to see that their clients received a fair trial" [A 146]. The trial judge specifically approved the trial "strategy" of admitting guilt [A, 146-147]. Trial counsel were described as "honest, diligent and capable lawyers..." whose performance in the trial court was consistent with this description [A, 147].

Neither the brief filed by the two trial counsel for the Wileys, nor the affidavit of the trial judge, suggested or stated that either or both of the Wiley brothers consented to this "strategy". Additionally, the Supreme Court of Kentucky permitted each Wiley to respond to the amicus brief [A, 148-153]. Earl Wiley described the "strategy" as "an unconsented to plea of guilt" [A, 149]. Elmer Wiley stated he "never consented to the admissions of guilt made by trial counsel" [Brief for Elmer Wiley in Response to Amicus Curiae Brief, hereinafter EWB, at 1]. Elmer's affidavit was filed with the Court. It states, in pertinent part:

> 3. At the trial of this case, the closing argument on behalf of affiant and his codefendant was made by the codefendant's attorney, William B. Norment, Jr.
>
> 4. During the course of the closing argument, Mr. Norment made several admissions that affiant and the co-defendant were guilty as charged.
>
> 5. Mr. Norment did not have affiant's consent to make the admission of affiant's guilt.
>
> 6. Affiant expressed his disapproval of the admissions of guilt made by counsel and counsel stated it would not make any difference.
>
> 7. Affiant was never advised of the possibility of a conflict of interest from Mr. Norment's joint representation of affiant and the codefendant. [EWB, Exhibit A.]

At no point in the state appeal did Kentucky contest the assertion of the Wileys that the admission of guilt by both counsel was done without the consent of, or consultation with, the defendants. [See Commonwealth's Brief in Kentucky Supreme Court.] In its opinion, the Kentucky Supreme Court rejected all of Wiley's arguments, stating in pertinent part:

> 5) Appellants contend they were denied effective assistance of counsel when defense counsel in closing chose to concede that appellants had been proven guilty and to argue instead for leniency, citing such facts as no endangerment to human life. This claim has never been presented to the trial court, hence we will not address it on appeal. [A, 156.]

When Earl Wiley filed his petition for writ of habeas corpus, he filed a sworn statement:

> B. Ground Two: Counsel's defacto plea of guilty not made with petitioner's voluntary and intelligent consent. [A, 159-160.]

In Wiley's memorandum in support of the petition, he states "...petitioner herein was challenging his guilt when trial counsel conceded his guilt" [A, 161]. Wiley quoted in his memorandum from his response to the amicus brief by trial counsel filed in the Supreme Court of Kentucky "...'trial strategy' can never include an unconsented-to plea of guilt" [A, 149, 162]. Again, in his memorandum below, Wiley stated: "Petitioner never acquiesced in counsel's admission of guilt..." [A, 163]. In Wiley's response to the Attorney General's answer below, Wiley again points out that the Commonwealth and trial counsel in their amicus brief have never alleged that Earl and Elmer consented to this "strategy":

> Nowhere in the amicus brief does it state that Petitioner consented to his "guilty plea" or was made aware that his trial counsel planned to present a complete admission of guilt as a "trial tactic." [A, 164].

At no point in the District Court did Kentucky contest Wiley's assertions that he never was informed of, nor did he consent to, either counsel's admission of guilt. Sowders did state: "We can only conclude that the petitioner deferred to his counsel's judgment in this matter" [Sowders Memorandum in District Court at 7, DE 3]. Sowders did not request an evidentiary hearing. Wiley did request an evidentiary hearing on this issue. In response to the Magistrate's Report, which recommended denial of the petition [A, 165-178], Wiley specifically objected to the failure to make a specific finding on the point of whether Wiley consented to counsel's admission of guilt:

> Finding of Fact No. 11 is incomplete and thus misstates the facts in that it fails to state that the admissions of guilt by counsel were made without the consent of Petitioner who had no

> prior knowledge that these admissions were to be presented to the jury by his counsel. [A, 179].

"Findings of Fact No. 11" had to do with counsel's admission of guilt [A, 169]. "Conclusion of Law No. 3" stated:

> There being no facts in dispute as raised by the petition, no evidentiary hearing is required. Townsend v. Sam, [sic] 372 U.S. 293. [A, 170].

Wiley requested an evidentiary hearing unless the Findings were corrected:

> Conclusion of Law No. 3 is contrary to law and to the evidence herein and should be set aside unless Finding of Fact No. 11 is corrected to state that Petitioner never consented to the admissions of guilt made by his trial counsel. See Townsend v. Sain, 372 U.S. 293... [A, 179].

The Magistrate also found, as a matter of law, that Wiley had "exhausted his state remedies..." [169-170]. Sowders did not file an objection to this conclusion of law. The District Court denied an evidentiary hearing, adopted the Magistrate's Report and dismissed Wiley's petition on the merits [A, 182-183].

On appeal to the Sixth Circuit, Wiley argued that unless his uncontradicted assertion that he did not consent to the lawyers' admissions of guilt was accepted, an evidentiary hearing was required [Wiley's Brief in Sixth Circuit at 22-24]. Sowders opposed this argument, arguing that a hering was unnecessary [Sowders Brief in Sixth Circuit, hereinafter SB, at 26]. Sowders also conceded that "he did not object to the magistrate's adverse finding..." on the question of exhaustion [SB, 1].

On April 24, 1981, the United States Court of Appeals for the Sixth Circuit unanimously held: First, Wiley had exhausted his state remedies on the issue of the effectiveness of trial counsel "by the unusual manner in whcih the claim came before..." the Kentucky Supreme Court [P, 40]. Second, Wiley was denied the effective assistance of counsel in vilation of the

Sixth Amendment of counsel's argument that Wiley was guilty despite counsel's "knowledge of petitioner's earlier 'not guilty' plea, and without petitioner's consent" [P, 45]. The Court stated:

> Petitioner first raised before the Kentucky Supreme Court his assertion that he did not consent to counsel's concession of guilt by his response to the amicus brief submitted by his trial counsel. No claim was ever made by trial counsel in their amicus brief to the Kentucky Supreme Court that their trial strategy was made known or consented to by petitioner. Petitioner reaffirmed his non-consent in his sworn petition for habeas corpus. Respondent did not dispute this issue. The United State Magistrate, in his finding of fact number 11, summarized the facts surrounding trial counsel's confession. The Magistrate's conclusion of law number 3 noted that no facts were in dispute. Petitioner objected to these findings insofar as they did not reflect his lack of consent to counsel's trial tactic. Petitioner's statement that he did not consent to counsel's trial tactic is not controverted. [P, 45].

Finally, the Court held that "...an alleged consent in the present case cannot be presumed from a silent trial record. Consent obtained without the protection of an on the record inquiry as required by Boykin v. Alabama, 395 U.S. 238 (1969)...is a nullity" [P, 45].

REASONS FOR DENYING THE WRIT

CONTRARY TO THE SUGGESTION OF THE PETITIONER, THE DECISION BY THE UNANIMOUS SIXTH CIRCUIT COURT OF APPEALS IS FACTUALLY CORRECT AND BASED UPON SUBSTANTIAL AND CONTROLLING LEGAL PRECEDENT OF THIS COURT. THE DECISION BELOW WAS BASED UPON THE UNCONTRADICTED FACTS IN THE RECORD WHICH WERE NOT PREVIOUSLY CHALLENGED BY KENTUCKY. THE DECISION BELOW IS NARROW IN SCOPE AND LIMITED TO THE UNIQUE FACTS OF THIS CASE. THE RESULT BELOW IS CONSISTENT WITH, AND REQUIRED BY, BROOKHART V. JANIS AND BOYKIN V. ALABAMA.

I.

THE DECISION OF THE SIXTH CIRCUIT REGARDING EXHAUSTION WAS CORRECT, WAS SPECIFICALLY TIED TO THE UNIQUE FACTS OF THIS CASE AND WAS PROPER BECAUSE RESORT TO FURTHER STATE PROCEEDINGS WOULD BE EXTREMELY TIME-

CONSUMING AND FUTILE. THE KENTUCKY SUPREME COURT HAD A MORE THAN "ADEQUATE OPPORTUNITY TO RULE ON THE RESPONDENT'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM." ADDITIONALLY, SOWDERS SANDBAGGED THE ISSUE OF EXHAUSTION BY FAILING TO PRESENT IT TO THE DISTRICT JUDGE. FINALLY, SOWDERS' EXHAUSTION ARGUMENT DOES NOT APPLY TO THE ALTERNATIVE BASIS OF THE SIXTH CIRCUIT'S DECISION.

A. UNIQUE FACTS OF THIS CASE.

Wiley recognizes, of course, the doctrine of exhaustion of state remedies and the valid policy reasons supporting it. Picard v. Connor, 404 U.S. 270, 275 (1971). In essence, the federal claim must have been "fairly presented to the state courts" for the exhaustion requirement to be satisfied. Id. In the present case, Kentucky had the required "opportunity to pass upon the matter" in question. Fay v. Noia, 372 U.S. 391, 420 (1963). The exact claim presented to the Sixth Circuit and to the district court below was presented to the Kentucky Supreme Court. While Sowders is correct that Wiley has not attempted a state post-conviction action, exhaustion of every conceivable state remedy is not required. Petitioners are not required to repeatedly apply for relief in state court. See Brown v. Allen, 344 U.S. 443, 449 n.3 (1953). "Nor does the mere possibility of success in additional proceedings bar federal relief." Wilwording v. Swenson, 404 U.S. 249, 250 (1971). As the Supreme Court has stated in Fay v. Noia, "the rule of exhaustion 'is not one defining power but one which relates to the appropriate exercise of power.'" 372 U.S. at 420, quoting Bowen v. Johnston, 306 U.S. 19, 27 (1939). In fact, "[b]ecause exhaustion is not considered to be a jurisdictional prequisite, the federal courts have heard claims not previously considered by the state court." Galtieri v. Wainwright, 582 F.2d 348, 354 (5th Cir. 1978) (en banc).

Sowders claims that the Kentucky Supreme Court did not receive a fair opportunity to resolve Wiley's claim that trial counsel was ineffective. An examination of the record will demonstrate that this is not true. In Wiley's appeal to the Supreme Court of Kentucky, that court took the unusual step of

permitting trial counsel for both defendants to file an amicus curiae brief detailing their trial strategy and asserting that they rendered effective assistance of counsel to their former clients [A, 137-147]. Furthermore, attached to the brief and filed in the Supreme Court of Kentucky was an affidavit from the trial judge expressing his opinion that trial counsel were "competent, professional and enthusiastic" in their representation of the Wileys at trial [A, 146]. The trial judge specifically approved the trial "strategy" of admitting guilt [A, 146-147]. Additionally, the Supreme Court of Kentucky permitted Wiley to respond to the amicus brief [A, 148-153]. Wiley described, without contradiction, the "strategy" as "an unconsented to plea of guilt" [A, 149]. It is clear that the Kentucky Supreme Court, by virtue of its own orders, had before it the position of all parties concerned: Earl and Elmer Wiley, the Commonwealth, both trial counsel and the trial judge. Clearly, the issue of trial counsel's ineffectiveness was "fairly" presented.

The Commonwealth's reliance upon Picard v. Connor, supra, is misplaced. Sowders claims that Mr. Picard "had asserted virtually the same challenge in the context of state law on direct appeal..." [P, 3; emphasis added]. It is clear that the petitioner in Picard, unlike Wiley, did not present his federal constitutional claim on appeal.

B. FUTILITY

Assuming arguendo that Wiley did not "fairly present" his claim of ineffective assistance of counsel to the Kentucky Supreme Court, Wiley asserts that various exceptions to the exhaustion doctrine are applicable. In the present case, there is "an absence of available state corrective process..." and there exist "circumstances rendering such process ineffective to protect the rights of the prisoner." 28 U.S.C. § 2254(b). Sowders claims that Wiley is free to present the issue of ineffective assistance of counsel by means of a post-conviction motion in the state trial court under Kentucky Rule of Criminal Procedure 11.42. Sowders' argument ignores the fact that return

to the state trial court would be a "futile gesture." Coley v. Alvis, 381 F.2d 870, 872 (6th Cir. 1967). The state trial court has already indicated that trial counsel performed competently and that the trial court was in full agreement with counsel's strategy [A, 146-147]. In this sense, the present case is equivalent to a situation where a state post-conviction remedy does not exist. See generally Collins v. Perini, 448 F.Supp. 1006 (N.D.Ohio 1978), aff'd 594 F.2d 592 (6th Cir. 1979).

The Sixth Circuit's opinion met this issue head on and decided it correctly. The Court examined the reality of what happened in state court rather than accepting Sowders exultation of form over substance.

> ...we conclude that although petitioner's claim was not preserved before the trial court the claim was fairly presented to the state supreme court. Our opinion that petitioner's claim was fairly presented to the appellate court is further reinforced by the unusual manner in which the claim came before that court. Having submitted an affidavit to the state supreme court, the trial judge effectively foreclosed petitioner's further relief through the conventional post-trial motion. Petitioner's remedy at the trial court level was prejudiced and any further pursuit rendered futile. The exhaustion doctrine does not require pursuit of a state remedy where such a pursuit is clearly futile...
>
> Conversely, the fact that the appellate court received this expanded record placed that court in substantially the same position as if the post-trial motion had been made, denied, and incorporated into the appellate record. After receiving the affidavit which foreclosed petitioner's trial court remedies, the appellate court was obligated to decide the ineffective counsel claim on the merits. Petitioner cannot be penalized because the Kentucky Supreme Court refused to decide an issue put squarely before it. Likewise, it is settled that satisfaction of the exhaustion requirement "cannot turn upon whether a state appellate court chooses to ignore in its opinion a federal constitutional claim squarely presented in petitioner's brief in state court." Smith v. Digmon, 434 U.S. 332, 333 (1978). [P, 39-40].

Another reason exists, anticipated by Sowders, why return to state court at this point would be futile. Federal courts have not required exhaustion when "an analysis of the

state court's substantive holdings of federal law indicates that an application for relief by the prisoner to the state courts would be futile." Developments in the Law--Federal Habeas Corpus, 83 HARV.L.REV. 1038, 1098 (1970)(footnote omitted). See Blackledge v. Perry, 417 U.S. 21, 24 (1974) [This Court did not require further exhaustion after the Court of Appeals held that "resort to the state courts would be futile"]. Contrary to Sowders' assertion, an examination of Kentucky law demonstrates that Wiley has no hope of success upon his claim. Wiley's research has disclosed no Kentucky decision holding a trial counsel ineffective on the basis of his trial performance--especially when an alleged trial "strategy" is at issue. The decisions cited by Sowders are distinguishable. Raisor v. Commonwealth, 278 S.W.2d 635 (Ky. 1955) [trial court failed to grant a continuance to permit adequate preparation--no mention of trial counsel's performance]; Vaughn v. Commonwealth, 505 S.W.2d 768, 770 (Ky. 1974) ["appointed counsel was not allowed adequate time for preparation, and ...there was a serious potential of conflict of interest..."]; Flener v. Commonwealth, 514 S.W.2d 201, 202 (Ky. 1974) [co-counsel drunk at trial].

Wiley submits that the absence of Kentucky decisions finding trial counsel ineffective is due to the archaic standard applied by the Kentucky appellate courts. The performance of counsel must "shock the conscience" of the court and "render the proceedings a farce and mockery of justice." Wahl v. Commonwealth, 396 S.W.2d 774, 775 (Ky. 1965). As stated by Mr. Justice Brennan in his dissenting opinion in Wainwright v. Sykes, 433 U.S. 72, 117 (1977):

> ...the so-called "mockery" test... abdicates any judicial supervision over attorney performance so long as the attorney does not make a farce of the trial. [Emphasis added; footnotes omitted.]

Wiley submits that the absence of any realistic inquiry by Kentucky courts into the question of trial counsel's performance in general indicates that return to state court with his claim would be an exercise in futility. Anticipating this argument, Sowders relies upon United States ex rel. Williams v.

Israel, 556 F.2d 865 (7th Cir. 1977). The Israel court rejected a claim that exhaustion of state remedies was not required because Illinois applied a different standard for determining the effective assistance of counsel than did Illinois. However, the Seventh Circuit noted that it had "declared a rule of federal constitutional law..." and went on to state that "we have no reason to believe that...[our standard] will not be followed by the Illinois courts in ruling on claims of ineffective assistance of counsel based on the Sixth Amendment." Id. at 867. Implicit, therefore, in Israel, is the suggestion that if the state and federal courts apply significantly different standards regarding the effective assistance of counsel, then exhaustion would be pointless. Unlike the situation in Israel, there is a stark difference between the standards applied by this Court and Kentucky's highest court. Kentucky has flatly refused to apply the standard set down in Beasley v. United States, 491 F.2d 687, 693 (6th Cir. 1974), which requires a realistic inquiry into trial counsel's performance. Kentucky insists on clinging to the meaningless standard of "farce and mockery." In Perkins v. Commonwealth, 516 S.W.2d 873, 874 (Ky. 1974), cert. denied 421 U.S. 971 (1975), the Kentucky Supreme Court stated:

> The public defender, in a petition for rehearing, asserted that there is contrary higher authority in the opinions in the following federal cases from the Sixth Circuit: Beasley v. United States... The public defender, is, of course, in error in his claim that the Sixth Circuit opinions constitute controlling higher authority in the sense of establishing precedents binding on this court.

The Sixth Circuit, in Berry v. Cowan, 497 F.2d 1274, 1276 (6th Cir. 1974), took note of the continuing divergence between that Court and Kentucky courts regarding this issue:

> We note that the Court of Appeals of Kentucky... applied standards which this circuit has recently expressly rejected as measures of the effectiveness of counsel under the Sixth Amendment. [Emphasis added.]

C. NO DELIBERATE BY-PASS

Sowders claims that Wiley's actions before the Kentucky courts "smacks of a deliberate by-pass..." and even claims that the Sixth Circuit acquiesced "in such maneuvering" [P, 10]. This

is simply untrue. Contrary to Sowders' argument, Kentucky law makes it clear that errors of federal constitutional magnitude may be reviewed on direct appeal despite a technical failure to present the issue to the trial court. See Futrell v. Commonwealth, 437 S.W.2d 487, 489 (Ky. 1969); Jackson v. Commonwealth, 450 S.W.2d 224, 226 (Ky. 1970). The power of the Kentucky appellate courts to review plain error has been exercised in Stone v. Commonwealth, 456 S.W.2d 43, 44 (Ky. 1970); Murphy v. Commonwealth, 551 S.W.2d 838 (Ky.App. 1977) and Cobb v. Hoskins, 554 S.W.2d 886 (Ky.App. 1977). Furthermore, the Kentucky appellate courts have often addressed the issue of the effective assistance of counsel on direct appeal, although the issue had not been raised in the trial court. See, e.g., Meadows v. Commonwealth, 550 S.W.2d 511, 512-513 (Ky. 1977); Relford v. Commonwealth, 558 S.W.2d 175, 178 (Ky.App. 1977); Nickell v. Commonwealth, 565 S.W.2d 145, 149 (Ky. 1978). Indeed, Meadows dealt with a claim similar to Wiley's.

As pointed out by the Sixth Circuit [P, 39-40], there is no doubt that the Kentucky Supreme Court could have resolved the issue of the effectiveness of trial counsel when it was presented. The fact that the Kentucky Supreme Court declined to do so does not mean that Wiley has failed to exhaust his state remedies. See Wilwording v. Swenson, supra.

D. SOWDERS SANDBAGGED THE QUESTION OF AN EVIDENTIARY HEARING.

Buried within the first question presented is Sowders' claim that the Sixth Circuit should have ordered an evidentiary hearing [P, 15]. Of course, this assertion is made despite Sowders' argument below that an evidentiary hearing was unnecessary [SB, 26]. It is inappropriate, to say the least, for a litigant to wait until the United States Supreme Court to raise such a claim. As pointed out by Sowders, it is well established that generally a reviewing court should not consider an issue not raised below. E.g., Singleton v. Wulff, 428 U.S. 106, 120 (1976). This rule applies to the government as well as to habeas corpus petitioners. E.g., Robinson v. Berman, 594 F.2d 1, 3

(1st. Cir. 1979); Hopkins v. Jarvis, 648 F.2d 981, 983 n.2 (5th Cir. 1981); Messelt v. Alabama, 595 F.2d 247 (5th Cir. 1979). This Court has refused to consider contentions by the government in habeas proceedings which were waived below. E.g., Jenkins v. Anderson, 447 U.S. 231, 234 n.1 (1980); Estelle v. Smith, ___ U.S. ___, 68 L.Ed.2d 359, 372 n.12 (1981).

Sowders claims that there is no evidence in the record to support the conclusion of the Sixth Circuit that Wiley did not consent to the two admissions of guilt by the two different lawyers [P, 15]. Actually, there is no evidence to contradict the sworn assertions by the Wileys that they did not consent. "Petitioner's statement that he did not consent to counsel's trial tactic is not controverted" [P, 45]. This was also true in the Supreme Court of Kentucky. Therefore, Sowders claim that Kentucky was deprived of an opportunity to resolve a factual dispute is meritless. In Sowders' view, there was no factual dispute worthy of a hearing until he filed his petition for writ of certiorari in this Court.

E. UNDUE DELAY

Another exception to the exhaustion doctrine which applies in this case deals with the specter of a lengthy delay prior to consideration of a petitioner's federal constitutional claim. Wiley has been incarcerated over three years pursuant to a conviction found to have been obtained in violation of the United States Constitution. The writ of habeas corpus is supposed to be a "swift and imperative remedy in all cases of illegal restraint and confinement." Braden v. 30th Judicial Circuit Court, 410 U.S. 484, 490 (1973). Since Kentucky does not apply the appropriate federal constitutional standard in determining whether Wiley received the effective assistance of counsel, it is likely he will find it necessary to return to federal court in order to obtain relief. This process could take a year and a half or more. The specter of "undue delay" strips the writ of habeas corpus of its intended force. In such a case, it would be proper to put aside the requirement of exhaustion of

state remedies, lest it be carried to an absurd extreme. Exhaustion ought not be required when the "state procedural snarls or obstacles preclude an effective state remedy." Bartone v. United States, 375 U.S. 52, 54 (1963). See also Dozie v. Cady, 430 F.2d 637 (7th Cir. 1970).

F. SOWDERS SANDBAGGED THE QUESTION OF EXHAUSTION.

In his initial petition, Wiley asserted that he had exhausted state remedies. [See Memorandum in Support of Petition, 3-8.] Sowders responded by claiming that petitioner had failed to exhaust state remedies. [See Memorandum of Law in Opposition to Petition for Writ of Habeas Corpus, 4-7.] Wiley's response was directed solely to this issue. [See Response to Motion to Dismiss.] The magistrate's report specifically rejected Sowders' argument and stated: "The petitioner has exhausted his state remedies by appealing all issues raised in this action to the Supreme Court of Kentucky." [A, 169-170; Conclusion of Law #2.] The magistrate's report gave "the parties" thirteen days to file written objections [A, 178]. 28 U.S.C. § 636(b)(1)(B) provides that a magistrate may review an application of a petitioner for post-conviction relief and make recommendations to the district judge. However, that statute requires "written objections to such proposed findings and recommendations." Further, the district judge "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." See 28 U.S.C. 2254, Rule 8(b)(3)(4) [Emphasis added]. By Sowders own admission, Sowders failed to register any objection to the magistrate's report that Wiley had exhausted state remedies [AB, 1]. The effect of this was that no issue of exhaustion of state remedies was ever presented to the district court. As in Smith v. Goquen, 415 U.S. 566, 576 n.19 (1974), the "exhaustion--of--remedies argument is belatedly raised..." [Emphasis added.] "[I]t appears that appellant did not raise his present exhaustion--of--remedies argument before the district court." Id.

The failure to object to a recommendation of the magistrate has the practical effect of failing to bring the issue to the attention of the district judge. It constitutes a waiver of any right to complain in the appellate court. See United States v. Walters, 638 F.2d 947 (6th Cir. 1981). In the district court's judgment, it is indicated that the court made a "de novo determination" of only those portions of the magistrate's report to which objections were filed [A, 182]. The district judge otherwise accepted the magistrate's report. Therefore, the district court was unaware that there was any issue as to exhaustion of state remedies. Sowders cannot now complain. The unfairness of the Commonwealth's position is clear. Assuming arguendo that Wiley did fail to exhaust state remedies and the district judge had been presented with the issue, it is theoretically possible that Wiley could have returned to state court at that time. However, the Commonwealth has chosen to "sandbag" petitioner. By resurrecting the issue of exhaustion on appeal, Sowders has insured (assuming for sake of argument this Court grants review and agrees with his exhaustion analysis) "undue delay" in the final resolution of Wiley's federal constitutional claim regarding the effectiveness of his counsel. For obvious policy reasons, this Court should not permit a state to waive an exhaustion claim in the district court and then resurrect it on appeal.

G. DISCRETIONARY NATURE OF HOLDING BELOW

It is important to emphasize the discretionary nature of the power of the lower federal courts to entertain claims such as Wiley's, whether they are "technically" exhausted or not. See Shelby v. Phend, 445 F.2d 1326 (7th Cir. 1971), where the court held that the petitioner had exhausted state remedies as to one of three possible grounds. The Seventh Circuit held that "considerations of judicial economy" dictate that the petitioner's two unexhausted grounds be considered along with the issue on which he had exhausted state remedies. Id. at 1327. Similarly, it is too late in the day for Sowders to be claiming

that Wiley failed to exhaust state remedies as to one of the five issues presented on appeal to the Sixth Circuit.

H. THE EXHAUSTION ARGUMENT RELATES ONLY TO ONE BASIS OF THE SIXTH CIRCUIT'S DECISION.

Relying principally on Galtieri v. Wainwright, supra, Sowders not only argues that the claim of ineffective assistance of counsel must be dismissed for failure to exhaust state remedies, but that all of Wiley's claims should be dismissed [P, 16]. This rather extreme action is unjustified in the present case for a number of reasons. First of all, Sowders failed to point out that the "almost unanimous analysis of the circuits which have considered this question" resolve it contrary to Sowders' position. Miller v. Hall, 536 F.2d 967, 969 (1st Cir. 1976). The Commonwealth correctly states that the Fifth and Ninth Circuits require a district court to dismiss a "mixed petition"--one which contains both exhausted and unexhausted claims. Galtieri; Gonzales v. Stone, 546 F.2d 807 (9th Cir. 1976). However, all the other circuits advocate review of exhausted claims of federal constitutional error even when they appear in a "mixed petition." Five circuits have specifically adopted a rigid rule that requires district courts to consider exhausted claims presented in "mixed petitions." Miller v. Hall, supra; United States v. Deegan, 440 F.2d 304, 305 n.1 (2nd Cir. 1971); United States ex rel. Boyance v. Myers, 372 F.2d 111 (3rd Cir. 1967)(per curiam); Hewett v. North Carolina, 415 F.2d 1316 (4th Cir. 1969); Tyler v. Swenson, 483 F.2d 611, 614 (8th Cir. 1973); Triplett v. Wyrick, 549 F.2d 57, 59-60 (8th Cir. 1977), refusing to overrule Tyler v. Swenson, supra. Three other circuits, including the Sixth Circuit, have not expressly articulated a rule. However, these circuits have repeatedly passed on the merits of appeals from decisions on the merits of claims in mixed petitions. Dombkowski v. Johnson, 488 F.2d 68, 70 (6th Cir. 1973); Meeks v. Jago, 548 F.2d 134, 137 (6th Cir. 1976), cert. denied, 434 U.S. 844 (1977); Brown v. Wisconsin State Dept. of Public Welfare, 457 F.2d 257 (7th Cir. 1972); Smith v. Gaffney, 462 F.2d 663 (10th Cir. 1972).

The substantial support for Wiley's position among the various circuits is persuasive on the issue presented. Wiley will not detail the numerous policy considerations supporting his position. The arguments are eloquently detailed in Judge Goldberg's dissent in Galtieri, 582 F.2d at 366-375. Among other things, 28 U.S.C § 2254(c) requires exhaustion of claims, not cases. Id. at 370. Addressing exhausted claims when properly presented reduces needless litigation in state court, is "entirely consistent with the purposes of the exhaustion doctrine," id. at 372, and, most importantly, demonstrates a sensitivity to the prisoner's interest in "speedy release from unconstitutional confinement." Id. at 375. It is worthy of note that in the Fifth Circuit, dismissal of "mixed petitions" was only approved by a widely divided court. The vote appears to be 8 to 6. Galtieri. Contrary to Sowders' claim, dismissal of a "mixed petition" leads to "piecemeal litigation" and is contrary to the interest of "judicial economy" [P, 16].

Most importantly, the theory relied upon by the Commonwealth deals with dismissal of "mixed petitions" by the district court. There is unanimous agreement among the circuits that once an exhausted claim reaches the appellate court, regarding which the district court reached the merits, the appellate court should also reach the merits despite the fact that the claim may have been originally presented in a "mixed petition." In fact, this is the basic thrust in Galtieri. The Ninth Circuit is in agreement. In Carothers v. Rhay, 594 F.2d 225 (9th Cir. 1979), the Court stated that when the lower court reaches an exhausted claim, the appellate court will do likewise.

Finally, neither the Fifth nor Ninth Circuits take a hard and fast approach to the "total exhaustion" rule. For example, there are many exceptions. In Gonzales v. Stone, supra, the Ninth Circuit referred to three exceptions: 1. "[S]ubstantial delay in state court proceedings; 2. "Reasonable explanation" for the failure to exhaust state remedies;" and 3. "considerations of fairness." Id. at 810. In Lamberti v. Wainwright, 513 F.2d 277, 284 (5th Cir. 1975), the court noted

two exceptions to the rule: 1. The prospect of state court relief is "tinged with delay..." and 2. waiver of the issue in the district court by the state. See also Kelley v. Estelle, 521 F.2d 238, 240-24] (5th Cir.]975), where the court reached the issue due to the considerations of fairness and judicial economy. Wiley submits that all of these exceptions to the rule are applicable to the case at bar. Especially relevant is the Fifth Circuit's exception regarding the failure to present the issue of exhaustion to the district court. As stated in West v. Louisiana, 478 F.2d 1026, 1034-1035 (5th Cir. 1973), aff'd regarding exhaustion en banc 510 F.2d 363 (1975): "Failure to raise a contention of lack of exhaustion at the district court level is ordinarly a bar to its consideration on appeal." To permit Sowders to "sandbag" the issue of exhaustion of state remedies and resurrect the issue on appeal would be a grave injustice, especially if Wiley's entire petition was to be dismissed. Most certainly, this would result in a lengthy delay before final adjudication of petitioner's federal claims. For all these reasons Wiley respectfully submits that this Court should not grant review.

II.

THE SIXTH CIRCUIT'S DECISION THAT WILEY WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WAS CORRECT AND REQUIRED BY THIS COURT'S DECISION IN BROOKHART V. JANIS BECAUSE THE UNCONTRADICTED EVIDENCE SHOWS THAT WILEY DID NOT CONSENT (ON THE RECORD OR OTHERWISE) TO ADMISSIONS OF GUILT ON HIS BEHALF BY HIS LAWYER AND HIS CODEFENDANT'S LAWYER AT THE GUILT AND ENHANCEMENT PHASES OF HIS TRIAL, SUCH A DECISION IS NOT AN ORDINARY TACTICAL DECISION MADE IN THE HEAT OF THE TRIAL, AND ONE OF THE ATTORNEY'S ADMITTED DURING ARGUMENT THAT THEY WEREN'T ASKING FOR MERCY. FURTHERMORE, NO COMPETENT TRIAL STRATEGY COULD JUSTIFY COUNSEL'S ACTION UNDER THE CIRCUMSTANCES OF THIS CASE.

The record is uncontradicted that counsel admitted Wiley's guilt during both portions of his trial without his consent and foreknowledge. Wiley did not knowingly and intelligently consent to any "trial tactic" authorizing counsel, and especially his co-defendant's counsel, to admit his guilt to

either the substantive or persistent felon charges. Finally, even assuming arguendo Wiley's consent, the alleged "tactical" justification for admitting the defendant's guilt during the first phase of a persistent felon trial and arguing for "mercy" and then admitting guilt during the second phase and not asking for "mercy" is not a "reasonably competent" tactic. Therefore, Wiley has been denied his Sixth and Fourteenth Amendment rights to effective assistance of counsel and due process of law. The decision below is undoubtedly correct.

A. UNCONSENTED TO PLEA OF GUILT

As demonstrated above, Wiley has consistently maintained, without contradiction, that he never consented to either counsel's admissions of guilt. Clearly, counsel cannot plead the accused guilty against the defendant's desire. White v. Ragen, 324 U.S. 760 (1945); Palfy v. Cardwell, 448 F.2d 328, 330 (6th Cir. 1971). Again, this is a personal decision for the client. Brookhart v. Janis, 384 U.S. 1 (1966). Wiley has been denied effective assistance of counsel. As stated by the Sixth Circuit:

> Unquestionably, the constitutional right of a criminal defendant to plead "not guilty," or perhaps moire acurately not to plead guilty, entails the obligation of his attorney to structure the trial of the case around his client's plea. We, therefore, hold that petitioner was deprived of effective assistance of counsel when his own lawyer admitted his client's guilt, without first obtaining his client's consent to this strategy. [P, 46].

B. ADMISSION OF GUILT BY CO-DEFENDANT'S LAWYER

Even if an attorney may admit his client's guilt in argument without violating the Sixth Amendment, certainly a co-defendant's lawyer cannot. Wiley was clearly denied his right to counsel during the second phase of the trial. See generally DeLuna v. United States, 308 F.2d 140 (5th Cir. 1962) [prejudicial comments by attorney for co-defendant].

C. CONFICT OF INTEREST

Wiley's counsel was in a conflicting position in admitting his client's guilt and arguing for "mercy" for Wiley

and his co-defendant. (The same holds true for co-counsel during the second phase.) In order to represent Wiley's co-defendant, counsel had to ignore individual elements of mitigation pertaining to only Earl or only Elmer. Wiley was denied effective representation by a conflict-free attorney. See generally Glasser v. United States, 315 U.S. 60 (1972); Holloway v. Arkansas, 435 U.S. 475 (1978).

D. REASONABLY COMPETENT TRIAL TACTIC

This Court has indicated in McMann v. Richardson, 397 U.S. 759, 771 (1970), that the Sixth Amendment requires that a criminal defendant receive "advice...within the range of competence demanded of attorneys in criminal cases." In Tollett v. Henderson, 411 U.S. 258, 264 (1973), the Court apparently reaffirmed the McMann standard. The Sixth Circuit has viewed McMann and Tollett as holding that the "reasonably competent" standard is mandated by the Federal Constitution. Beasley v. United States, 491 F.2d 687, 693 (6th Cir. 1974); see also Marzullo v. Maryland, 561 F.2d 540 (4th Cir.), cert. denied 435 U.S. 1011 (1978). Therefore, assuming arguendo counsel's admission of guilt was a "trial tactic" and that Wiley intelligently consented to it (a big assumption), the trial tactic must be a "reasonably competent" one. In holding that an attorney may waive his client's "Sixth Amendment right of confrontation by stipulating to the admission of evidence" the Fifth Circuit required a showing of the agreement of the defendant and a demonstration that "the attorney's decision was a legitimate trial tactic or part of a prudent trial strategy." United States v. Stephens, 609 F.2d 230, 232-33 (5th Cir. 1980). In the present case counsel's "tactic" was not reasonably competent. It certainly was not prudent.

Wiley submits that the motions of trial counsel at the close of the evidence demonstrate that their assessment of the case was not as hopeless as they asserted in their amicus brief. Counsel requested a directed verdict "...on the grounds that the evidence elicited by the Commonwealth...failed to make out a prima facie case of burglary in the first degree..." [A, 75-76].

A motion was also made for an instruction on circumstantial evidence. [A, 78].

Counsel also requested lesser included instructions [A, 82]. It is clear that counsel had various arguments available other than that which they ultimately pursued. The jury was only instructed on the highest degree of burglary. A reasonable argument could be made that the Commonwealth failed to prove that degree of burglary. There was no proof that either Earl or Elmer were armed with a pistol during the burglary. Counsel could have attacked this required element in the instructions.

Other potential issues were referred to by counsel during closing argument. "You know there were no eyewitnesses, nobody actually saw them go in and come out" [A, 89-90]. Reference was made to a possible issue of intoxication. Counsel argued: "[t]hese men were drinking. There was beer in the car. Officer Sauls said that Elmer, when they first stopped this truck, said well yes he was shaking, he was coming down with a hangover" [A, 95].

Additionally, counsel's argument appears to betray the alleged tactical justification. Counsel seemed concerned with being "foolish" and "naive" and "immature" [A, 90]. Counsel did not wish to be a "lying fool to the citizens of Henderson, Kentucky" [A, 97]. Finally, counsel contradicted their own alleged tactical justification. In the persistent felon phase, counsel argued:

> We don't ask you folks for mercy here. I feel there is little enough of that in the world anyway and what there is isn't to be applied in a case like this. These men are guilty. They are guilty of a serious crime. [A, 129; emphasis added.]

The Sixth Circuit noted that: "The specific strategy is unclear, particularly when counsel told the jury he was not asking for mercy" [P, 36].

Wiley does not contend that there will never be a case where an admission of guilt could not be tactically justified.

For example, a defendant facing a death sentence may wish to admit his guilt and throw himself on the mercy of the jury. However, this is not such a case. Since there were no lesser included offenses submitted to the jury during the first phase, counsel's argument for "mercy" is irrelevant. Wiley was facing a charge of second degree persistent felony offender which permits enhancement of a sentence to the next highest degree--regardless of whether the jury returns the minimum or maximum punishment in the normal sentencing range. Ky. Rev. Stat. 532.080(2). Since the persistent felony proceeding is often "automatic" enhancement under Kentucky law--an admission of guilt during the first portion of the trial has drastic consequences for the defendant. Furthermore, contrary to counsel's theory, the jury is likely to (and apparently was in this case) angered by counsel's apparent "candor" when they find out that the defendant has been convicted of prior felonies. Instead of the intended benefit, counsel's tactics produced the opposite effect. Counsel's admissions of guilt during each phase of Wiley's trial was not a reasonably competent trial tactic. As stated by the Sixth Circuit:

> Under the facts of this case, however, no such claim [that no prejudice resulted from counsel's admissions] could seriously be raised. Despite strong circumstantial evidence against petitioner, no witness observed the burglary. No one saw a gun in the hand of either defendant. Yet use of a "deadly weapon" is one of the essential elements under Kentucky law of first degree burglary. Who can be sure that both or either of these brothers would have been convicted had not the jury been told by defendant's own attorney "they're guilty"? [P, 46-47].

E. AN ADMISSION OF GUILT IS NOT EQUIVILENT TO ORDINARY TACTICAL DECISIONS MADE BY COUNSEL AT TRIAL. THE FLOODGATES WILL REMAIN CLOSED.

Sowders argues with some vigor that the decision below will provoke a "flood of claims" [P, 25] with "tremendous repercussions...the criminal defendant's consent will have to appear in the record on such matters of strategy as the...failure to object...the type of questions to be asked of witnesses..." [P, 19]. Were this true, Wiley would certainly agree that review by this Court would be imperative. However, as is quite obvious, this contention is utter nonsense.

F. NO CONFLICT

Sowders failed to cite a single decision in conflict with the opinion below with the exception of the decision of the Kentucky Supreme Court in Wiley's case (a situation which occurs in every instance a federal court grants habeas relief.) For all the reasons stated above, this Court need not and should not grant review.

III.

THE SIXTH CIRCUIT'S DECISION THAT WILEY WAS DENIED DUE PROCESS OF LAW BY THE ADMISSION OF GUILT ON HIS BEHALF BY THE TWO LAWYERS, IN THE ABSENCE OF ANY INDICATION IN THE RECORD OF WILEY'S CONSENT, IS CORRECT AND REQUIRED BY THIS COURT'S DECISION IN BOYKIN V. ALABAMA SINCE COUNSEL'S ADMISSIONS IN THIS CASE CONSTITUTED THE FUNCTIONAL EQUIVILENT OF A GUILTY PLEA.

The Sixth Circuit's decision is totally consistent with this Court's landmark decision in Boykin v. Alabama, 395 U.S. 238 (1969).

> The decision to plead "guilty" or "not guilty" is a decision reserved solely for the accused based on his intelligent and voluntary choice. Boykin v. Alabama, 395 U.S. 238 (1969). The defendant's decision to plead guilty cannot be presumed from the plea itself in the context of an otherwise silent record. Instead, the trial court must make an on the record inquiry of the defendant to insure that the defendant's plea is voluntary and intelligent. Id., at 243-244 [P, 42-43].
>
> * * * *
>
> In those rare cases where counsel advises his client that the latter's guilt should be admitted, the client's knowing consent to such trial strategy must appear outside the presence of the jury on the trial record in the manner consistent with Boykin, supra.
>
> Although statements made by attorneys in closing arguments are not evidence, nevertheless, for all practical purposes, counsel's admission of guilt on behalf of his client denied to petitioner his constitutional right to have his guilt or innocence decided by the jury. Petitioner, in pleading not guilty, was entitled to have the issue of his guilt or innocence presented to the jury as an adversarial issue. Counsel's complete concession of petitioner's guilt nullified the adversarial quality of this fundamental issue. [P, 46].

In Boykin, 395 U.S. at 241, this Court held that because a guilty plea involves the waiver of basic constitutional rights, the record of the court accepting such a plea must demonstrate "an affirmative showing that it was intelligent and voluntary." The traditional guilty plea situation is tantamount to a waiver of three important federal rights: "First, the privilege against self-incrimination guaranteed by the Fifth Amendment... Second, is the right to trial by jury... Third, is the right to confront one's accusers..." Boykin, 395 U.S. at 243-244. Contrary to Sowders suggestion [P, 27-28], Wiley forfeited the same basic rights in the present case by virtue of his counsel's unilateral action. Wiley chose not to testify. Therefore, counsel's admissions waived Wiley's right to remain silent. Similarly, Wiley chose to plead not guilty and submit the case to a jury. Counsel's admissions of guilt negated Wiley's decision to be tried by a jury. Finally, although counsel did engage in some cursory cross-examination, the nature of this cross-examination was equivalent to none at all. Therefore, counsel's admissions of guilt have the same effect as a conventional plea of guilty.

Sowders' argument overlooks the crucial fact that in Boykin the prosecution presented its case regarding guilt despite the plea. Furthermore, "counsel for petitioner engaged in cursory cross-examination..." as in the this case. 395 U.S. at 240. There are more similarities between the present case and Boykin than Sowders would care to admit. In actuality Wiley is worse off than the petitioner in Boykin. After all, at least Edward Boykin entered his own plea of guilty. In the present case, Wiley was never heard from and his lawyer entered his plea of guilty. As Mr. Justice White pointed out in his concurring opinion in Henderson v. Morgan, 426 U.S. 637, 650 (1976):

> ...it is too late in the day to permit a guilty plea to be entered against a defendant solely on the consent of the defendant's agent -- his lawyer. Our cases make absolutely clear that the choice to plead guilty must be the defendant's... it is on his

admission that he is in fact guilty that his conviction will rest. [Emphasis added].

An attorney simply does not have the power to enter a plea which is contrary to his clients expressed plea in open court. In the present case, Earl Wiley pled not guilty and never indicated a desire to change that plea. In Brookhart v. Janis, 384 U.S. 1, 6 (1966), the defendant's lawyer agreed to a "prima facie trial" The Court assumed that the lawyer "knowingly agreed that the state need only make a prima facie showing of guilt and that ne would neither offer evidence on petitioner's behalf nor cross-examine any of the state's witnesses." 384 U.S. at 7. There was a confusing colloquy at trial in which the defendant stated that he was not pleading guilty. This Court stated:

> The record shows, however, that petitioner himself did not intelligently and knowingly agree to be tried in a proceeding which was the equivalent of a guilty plea...
>
> * * * *
>
> Our question therefore narrows down to whether counsel has power to enter a plea which is inconsistent with his client's expressed desire and thereby waive his client's constitutional right to plead not guilty and have a trial in which he can confront and cross-examine the witnesses against him. We hold that the constitutional rights of a defendant cannot be waived by his counsel under such circumstances. Id.

The situation is even more serious when counsel acutally admits guilt, as compared to merely stipulating to evidence, etc. Compare Symons v. Klinger, 372 F.2d 47, 50 (9th Cir. 1967). Stipulations by counsel admitting elements of a crime have often been condemned, absent an inquiry of the defendant by the trial judge. See, e.g., United States v Brown, 428 F.2d 110 (D.C. 1970); Cox v. Hutto, 589 F.2d 394 (8th Cir. 1978), on remand 476 F.Supp. 906 (E.D.Ark. 1979), aff'd 619 F.2d 731 (8th Cir. 1980). Sowders cites no authority to the contrary. Since the decision below is consistent with prior decisions of this and other courts, review should be denied.

CONCLUSION

For the reasons stated in this Brief, respondent Wiley respectfully requests this Court to deny the petition for a writ of certiorari filed in his case.

Respectfully submitted,

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NO. 81-113

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

DEWEY SOWDERS, SUPERINTENDENT,
KENTUCKY STATE REFORMATORY — PETITIONER

VS. CERTIFICATE OF SERVICE

EARL WAYNE WILEY — RESPONDENT

* * * * * * * * *

I, Kevin Michael McNally, counsel for respondent, certify that the attached Brief for Respondent in Opposition and Motion For Leave To Proceed In Forma Pauperis was mailed to the Office of the Clerk of the United States Supreme Court, Washington, D.C., 20543, and to counsel for respondent, Hon. Michael R. Beiting, Assistant Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601, this 6th day of October, 1981, by personally depositing same in a United States mail box, first-class postage prepaid.

KEVIN MICHAEL McNALLY
ASSISTANT PUBLIC ADVOCATE
MEMBER, BAR OF THE
UNITED STATES SUPREME COURT

COUNSEL FOR RESPONDENT

Subscribed and sworn to before me by Kevin Michael McNally, this 6th day of October, 1981.

NOTARY PUBLIC, STATE AT LARGE

My Commission Expires: 11-13-84.

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MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

EARL WAYNE WILEY — RESPONDENT

* * * * * * * * * *

The respondent, Earl Wayne Wiley, asks leave to file the attached Brief for Respondent in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

The petitioner has been permitted by both the Kentucky and federal courts to proceed as an indigent at all stages of this action. The undersigned was appointed as counsel under the Criminal Justice Act of 1964 by the United States Court of Appeals for the Sixth Circuit. Pursuant to Rule 46.1 no affidavit of indigency is required.

Respectfully submitted,

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